

Arnold v. City of Cleveland: An Analysis of the Constitutionality of Assault Weapon Bans in Ohio

ELIZABETH M. WELCH

I. INTRODUCTION

The issue of gun control is hardly a new one. The much publicized national issue over the need for tougher controls on gun purchases and availability has forced the general public to take sides in a very heated debate. However, most of the popular debate, as well as scholarly debate, has focused on the need for legislation at the federal level and the possible conflicts that could arise with the Second Amendment to the United States Constitution and its guarantee of the "right to bear arms."¹ While federal legislation may be the best answer to our nation's criminal statistics, the debate leaves out another important aspect of "right to bear arms" law—the constitutions of the fifty states and the "right to bear arms" under these documents.² Focusing on the state level becomes all the more important because the Second Amendment has been held by the United States Supreme Court to apply only to federal legislation and enactments—not the individual states.³ Therefore, the constitutionality of any legislation on the

¹ "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. See generally STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 76-178 (1984); Peter C. Fetter & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46 (1966); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). Robert A. O'Hare, Jr. & Jorge Pedreira, Note, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179 (1992). For a thorough history of the origins of the Second Amendment, see Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989).

² All but seven of the states in the union contain "right to bear arms" provisions in their constitutions: California, Iowa, Maryland, Minnesota, New Jersey, New York, and Wisconsin do not have specific guarantees. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 59 n.2 (1989). For the text of all state constitutions containing right to bear arms provisions, see *id.* at 84-89.

³ *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886) (noting that the "[second] amendment is a limitation only upon the power of Congress and the national government, and not upon that of the States," and thus does not reach the state or local governments); *Miller v. Texas*, 153 U.S. 535, 538 (1894) (reiterating the fact that the Second

state or local level is governed by the state constitutions.

The state of Ohio has a long history of cases concerning the Ohio "right to bear arms" provision. The majority of these cases uphold restrictions on the constitutional right based upon the state's police power.⁴ However, the Ohio Supreme Court never had the opportunity to decide upon the constitutionality of a complete ban on a class of weapons until *Arnold v. City of Cleveland*.⁵ In *Arnold*, the Ohio Supreme Court upheld a Cleveland ordinance banning assault weapons from the city limits as consistent with the police power of the municipality.⁶ The purpose of this Note is to review the *Arnold* decision, which upheld, for the first time, a complete ban on a class of weapons, and to examine a state or municipality's justification for such action.

Part II will examine the historical development of "right to bear arms" provisions in state constitutions generally as well as the development of and justification for restrictive ordinances. Additionally, the approach taken by the Ohio courts on the issue of gun control will be examined. Part III will focus specifically on the *Arnold* decision and its consistency with related decisions in the past as well as the historic approach taken by the lower courts in Ohio. Furthermore, it will clarify the court's use of the police power to justify the assault weapon ordinance. Part IV will examine the future of assault weapon ordinances in Ohio and around the nation. The impact of current federal

Amendment's restrictions "operate only upon the Federal power").

⁴ The Ohio "right to bear arms" provision states: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

See, e.g., Mosher v. City of Dayton, 358 N.E.2d 540, 543 (Ohio 1976) (holding that municipal ordinance requiring those seeking to possess a handgun to acquire identification card not unconstitutional due to reasonable exercise of police power); State v. Nieto, 130 N.E. 663, 664 (Ohio 1920) (noting that "[t]he constitution contains no prohibition against the legislature making such police regulations necessary for welfare of public at large" and thus allowed prohibition against carrying a concealed weapon); Hale v. City of Columbus, 578 N.E.2d 881, 884 (Ohio Ct. App. 1990) (holding that city ordinance prohibiting possession or sale of assault weapons or large capacity magazines was reasonable exercise of police power). The original 1802 provision was revised in 1852 into its current form, but no reported debate over the enactment exists. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993).

⁵ 616 N.E.2d 163 (Ohio 1993).

⁶ *Id.* at 173 (finding that "former Cleveland Ordinance No. 415-89, prohibiting the possession and sale of assault weapons in the city of Cleveland, was a proper exercise of the police power under section 3, article XVIII of the Ohio Constitution and does not violate [the Ohio constitutional 'right to bear arms']").

legislation upon these ordinances will also be considered.⁷

II. HISTORICAL DEVELOPMENT OF GUN CONTROL RESTRICTIONS UNDER STATE CONSTITUTIONAL "RIGHT TO BEAR ARMS" PROVISIONS

A. *Emergence of State Constitutional Right to Bear Arms*

State constitutional provisions guaranteeing the right to bear arms are frequently the focus of challenges to state gun control laws because the Supreme Court has held that no absolute right to bear arms was recognized at common law, and because the limitations imposed by the Second Amendment have been interpreted to limit only Congress from infringing upon any existing state right to bear arms.⁸ As a result of the latter interpretation, the states are not affected by the limits imposed by the United States Constitution.⁹ Therefore, it is important to understand the provisions each state provides in its constitution when guaranteeing the right to bear arms. All but seven of the states in the Union guarantee a right to bear arms in their constitutions.¹⁰ Historically, the right to bear arms has been justified by three purposes: to maintain a militia,¹¹ to deter oppression,¹² and to provide for self-defense.¹³

⁷ This Note will not examine the constitutionality of any proposed or enacted federal legislation under the Second Amendment. However, the various approaches taken by the Supreme Court in examining the Second Amendment will be analyzed for purposes of analogy to the Ohio "right to bear arms" provision. See discussion *infra* part II.A.2.

⁸ See cases cited *supra* note 3 and accompanying text.

⁹ See cases cited *supra* note 3 and accompanying text.

¹⁰ See *supra* note 2 and accompanying text; see also Martin C. Ashman, *Handgun Control by Local Government*, 10 NO. KY. L. REV. 97, 99-100 (1982); Mark Udulutch, Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 28 (1989).

¹¹ The desire for a right to bear arms has prevailed since the American Revolution, when citizen militias rather than a centrally controlled standing army were preferred for protection against both internal and external threats. Michael D. Ridberg, Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185, 190 (1970). All capable men were considered to be part of the militia and were expected to use their own weapons when called to duty. *Id.* *United States v. Miller*, 307 U.S. 174, 179 (1939). As Ridberg notes, this rationale is much weaker now that arms for the militia are provided by the government. Ridberg, *supra*, at 191.

¹² One of "the earliest justifications for a right to bear arms was [] to deter [the] government from oppressing unarmed [portions] of the population." This may have been the ultimate purpose for relying upon citizen militias in the United States. With members of the militia possessing weapons in a private capacity, the threat of tyrannical force by a standing army was removed. Ridberg, *supra* note 11, at 191 (citing 2 JOSEPH STORY,

Anti-gun control advocates argue that these three purposes prohibit the imposition of restrictions on right to bear arms provisions.

1. *State Constitutional Provisions: Construction and Interpretation*

While most states guarantee a right to bear arms, the construction of this guarantee and its interpretation differs dramatically between states. When analyzing the "right to bear arms" provisions, one must first determine if the rights guaranteed are collective (*i.e.*, able to be invoked by the state)¹⁴ or individual.¹⁵ To understand this distinction, an analysis of the theories concerning the United States' Second Amendment are helpful, for it can be compared by analogy to many state constitutional provisions.¹⁶ The debate is essentially between two factions: those who believe that the Second Amendment (or right to bear arms provisions generally) protects only the state's right to establish a military force while guaranteeing nothing to the individual,¹⁷ and those who view the Second Amendment as protecting the individual's right to bear arms which prevents the state from prohibiting this right entirely.¹⁸ With regard to the Second Amendment, few legal scholars recognize the individual rights theory.¹⁹ In explaining the emergence of the collective rights view, which is supported by the majority of legal scholars and courts, one must examine the legal opinions which support this proposition.

While the Supreme Court has considered cases with an indirect connection with the Second Amendment,²⁰ only one case directly considered the scope of

COMMENTARIES ON THE CONSTITUTION 646 (1833)).

¹³ Self-defense was always considered to be a natural right at common law. Ridberg, *supra* note 11, at 192. See also 4 WILLIAM BLACKSTONE, COMMENTARIES *130. "Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." However, "it did not emerge as a justification for the right to bear arms until its incorporation into several state arms provisions," and may have been a reflection of the American frontier experience. Ridberg, *supra* note 11, at 192-93 (citing *Matthews v. Indiana*, 148 N.E.2d 334, 339-41 (Ind. 1958) (Emmert, J., dissenting)).

¹⁴ See *infra* notes 29, 33-38 and accompanying text.

¹⁵ See *infra* notes 30-32 and accompanying text.

¹⁶ See discussion *infra* part II.A.2.

¹⁷ See *Kates*, *supra* note 1, at 206.

¹⁸ See *id.*

¹⁹ *Id.* at 206. See also, *e.g.*, Ashman, *supra* note 10, at 102-03; O'Hare & Pedreira, *supra* note 1, at 188-90; Udulutch, *supra* note 10, at 30-31 (endorsing the view that the Second Amendment guarantees a collective right to bear arms only).

²⁰ Three cases were decided in the nineteenth century, but they are not very helpful in determining the true meaning of the Second Amendment because none of them decided the

the Second Amendment: *United States v. Miller*.²¹ The case involved a prosecution under the National Firearms Act of 1934, for transportation in interstate commerce of an unregistered sawed-off shotgun.²² The defendants argued that this restriction violated the Second Amendment.²³ The Court, however, found that the statute did not violate the Constitution in the absence of a showing of any reasonable relationship between such weapons and a well-regulated militia.²⁴ The Court continued by noting why the relationship between a weapon and a well-regulated militia was relevant:

The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the service of the United States" With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment was made. *It must be interpreted and applied with that end in view.*²⁵

Thus, the Supreme Court held that the Second Amendment's guarantee that the "right of the people to keep and bear arms shall not be infringed" should be

full scope and definition of the right. *See Miller v. Texas*, 153 U.S. 535, 538 (1894) (citing *United States v. Cruikshank*, 92 U.S. 542 (1876), to support proposition that the Second and Fourth Amendments did not apply to the states); *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886) (holding that Second Amendment applied only to infringements by the federal government—not states and local government); *Cruikshank*, 92 U.S. at 553 (holding that the Second Amendment was not "a right granted by the Constitution" and that the citizens must look for protection from the police power of the state).

²¹ 307 U.S. 174 (1939). *But see* Dowlut, *supra* note 2, at 74–75 (stating that the decision was one-sided and ambiguous as to modern arms of mass destruction).

²² *Miller*, 307 U.S. at 175.

²³ *Id.* at 175–76.

²⁴ *Id.* at 178.

²⁵ *Id.* (quoting U.S. CONST. art. 1, § 8) (emphasis added). Professor Tribe has noted:

[T]he central concern of the second amendment framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy. Thus, the inapplicability of the second amendment to purely private conduct, to state action and to congressional firearms controls not shown to interfere with the preservation of state militia and to gun control generally comports with the narrowly limited aim of the amendment as merely ancillary to other constitutional guarantees of state sovereignty.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (1978) (citations omitted).

interpreted and applied with reference to the continuation of state militias.²⁶ Because the sawed-off shotgun in *Miller* had no relationship to preserving the militia, the restriction on bearing arms was held constitutional.²⁷ While the Federal Constitution does not impact directly upon the state constitutional right to bear arms,²⁸ it has had an effect on the state interpretations of the "right to bear arms" provisions by analogy to the Second Amendment.

Some state constitutions contain provisions which have a plural construction, commonly interpreted to be collective in intent, identical to the Second Amendment of the United States Constitution,²⁹ but many other plural constructions focus upon the right as necessary for the "common defense," for "security and defense," or for the "defense of themselves and the State."³⁰ These constructions leave open more room for an individual right to bear arms. Some states, however, have developed a right to bear arms provision which uses a singular subject or "individual" in its clause.³¹ The construction and judicial interpretation for the "individual clause" differs dramatically from the plural construction. Private possession of guns is essentially guaranteed by such clauses, going well beyond the collective interpretation of the guarantees of the Second Amendment, and therefore leaving open more ambiguities for the courts to interpret.³²

²⁶ *Miller*, 307 U.S. at 178-79.

²⁷ *Id.* at 178.

²⁸ See *supra* note 3.

²⁹ The five states with right to bear arms provisions identical to the Second Amendment are: Alaska (ALASKA CONST. art. I, § 19), Hawaii (HAW. CONST. art. I, § 15), Louisiana (LA. CONST. art. I, § 8), North Carolina (N.C. CONST. art. I, § 24), and South Carolina (S.C. CONST. art. I, § 26). Ridberg, *supra* note 11, at 195 n.45. See also *supra* note 19 and accompanying text.

³⁰ Provisions which state a right to bear arms by the "People . . . for the Common Defense" affirm the right of the citizens to keep and bear arms for the common defense. Provisions which state a right to bear arms by the "People . . . for their Security and Defense" are more ambiguous because it is unclear whether or not "their" is used in an individual or collective sense. Provisions which state a right to bear arms by the "People . . . for Defense of Themselves and the State" indicate a militia purpose, but a more strained reading is needed to interpret "themselves" as always guaranteeing a collective right. Ridberg, *supra* note 11, at 196-97. For a detailed analysis of each state's provisions, see *id.* at 195-201.

³¹ A singular construction may be stated as a "Citizen[s] [right to bear arms shall] not [be] infringed," a "Citizen [has a right to bear arms] for common defense," a "Person [has a right to bear arms] for Defense of Himself and State," or a "Person [has a right to bear arms] in defense of his Home, Person and Property, or the Civil Power." Ridberg, *supra* note 11, at 198-200. Most of these individual rights provisions can be interpreted as granting a private right of possession. *Id.*

³² See *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the right to bear

The first case which interpreted a state constitutional provision as guaranteeing only a collective right to bear arms was *City of Salina v. Blaksley*.³³ The Kansas court interpreted its right to bear arms provision, which stated that "the people have the right to bear arms for their defense and security," as referring to the people as a collective body.³⁴ The court noted that "[i]t was the safety and security of society that was being considered when this provision was put into our constitution."³⁵ The court continued by referring to the construction of the provision, which is followed by a reference to the military and the danger of allowing standing armies in times of peace. Therefore, the court concluded that the provision was intended to exclusively govern the military—and did not refer to individuals.³⁶

Other states with provisions guaranteeing the right of the people to bear arms, followed by a need for maintaining a militia, have construed these provisions consistent with this view.³⁷ In *Commonwealth v. Davis*, the court found that the "right to bear arms" provision in the Massachusetts Constitution, which provided such a right for the common defense, did not guarantee individual ownership of weapons other than those needed for the state militia.³⁸ Thus, the court held that a statute prohibiting shotguns with less than an eighteen inch barrel was constitutional as a valid police measure.³⁹

arms is not infringed upon in absence of showing that arms bear reasonable relationship to weapons used in the militia). This endorses the collective view used in interpreting the Second Amendment. This approach has been consistently followed by the lower federal courts. See *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (stating that "[i]t is clear that the Second Amendment guarantees a collective rather than an individual right"), *cert. denied*, 426 U.S. 948 (1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (noting that "the Second Amendment only confers a collective right [to] bear [] arms . . ."); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (noting that "[s]ince the Second Amendment right 'to keep and bear Arms' applies only to the right of the state to maintain a militia and not to the individual's right to bear arms, there can be no serious [] constitutional right of an individual to possess a firearm"). See also *supra* notes 1, 19 and accompanying text.

³³ 83 P. 619 (Kan. 1905).

³⁴ The Kansas Constitution's right to bear arms provision states in full: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." KANS. CONST. BILL OF RIGHTS § 4.

³⁵ *Blaksley*, 83 P. at 620.

³⁶ *Id.*

³⁷ See, e.g., *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976).

³⁸ *Id.* at 849.

³⁹ *Id.* at 850.

2. The Ohio Constitutional "Right to Bear Arms"

In Ohio, the constitution states that "[t]he people have the right to bear arms for *their* defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up"⁴⁰ This particular language is ambiguous because of the difficulty in determining whether "their" is intended to refer to the people in a collective or individual sense. The use of "security" could be construed to include reliance on the militia as a defense as well as a deterrence of oppression, because "security" of the people in general may not always be the same as that of the state.⁴¹ While reading the first clause of this provision alone may seem to suggest an individual right to bear arms because the Framers did not intend for the state itself to bear the arms,⁴² a further reading of the entire provision is needed to understand its true meaning.

The first clause read in conjunction with the second clause seems to suggest that the Framers intended a right to bear arms only for service in the Ohio militia.⁴³ In 1920, the Ohio Supreme Court noted in *State v. Nieto* that the Second Amendment of the United States Constitution should be used as a guide to interpret Ohio's right to bear arms provision.⁴⁴ Therefore, the right has been interpreted as essentially a collective right, which parallels the construction and interpretation of the Second Amendment.⁴⁵ The federal courts have interpreted the Second Amendment to grant a right to bear arms only in connection with service in a "well regulated militia."⁴⁶ Thus, the numerous cases limiting the Second Amendment's interpretation can be analogized to the

⁴⁰ OHIO CONST. art. I, § 4 (emphasis added). For the full text of the Ohio "right to bear arms" provision, see *supra* note 4.

⁴¹ Ridberg, *supra* note 11, at 196.

⁴² *But see* Brief of Amicus Curiae for Appellant, Ohio Constitution Defense Council at 16-17, *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (No. 92-105) (on file with the Supreme Court of Ohio). The brief states that if the right were purely collective, and no individual had a right to bear arms, then article 1, § 4 would be meaningless. *Id.* The claim is made that the Framers intended "to reserve all power 'in the people,' not to give an additional grant of power in authority to the state" *Id.* (citing OHIO CONST. art. I, §§ 2, 20).

⁴³ *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920) (holding that statute prohibiting carrying concealed weapon was not unconstitutional).

⁴⁴ *Id.* at 664. *See also* *City of East Cleveland v. Scales*, 460 N.E.2d 1126, 1130 n.6 (Ohio Ct. App. 1983) (noting that "[t]he [Ohio] safeguard is a collective, not an individual [right] . . .").

⁴⁵ *See* discussion *supra* part II.A.1. *See also* *Scales*, 460 N.E.2d at 1130 n.6.

⁴⁶ *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that no right to bear arms exists if there is no showing of any reasonable relationship between weapons and a well-regulated militia). *See also* cases cited *supra* notes 20 and 32 and accompanying text.

Ohio Constitution. Consequently, the Ohio courts have followed this construction.⁴⁷ More recently, an Ohio appellate court noted that “the safeguard is a collective, not an individual right,” similar to the Second Amendment guarantee, which “is dependent upon a role in rendering the militia effective. It is a military, not an individual, concept.”⁴⁸ As such, when deciding whether or not a municipal ordinance is valid under the Ohio Constitution, the courts have based their decision upon the finding that the “right to bear arms” provision guarantees a collective right only, which is consistent with the Second Amendment interpretation.⁴⁹

B. Emergence of Restrictions on the Ohio Right to Bear Arms

Restrictions on the right to bear arms existed long before the United States Constitution and the Second Amendment. In fact, at English Common Law in 1328, a statute existed stating that no one should “go nor ride armed by night nor by day in fairs, markets, nor in the presence of the justices or other ministers.”⁵⁰ Thus, no absolute right for an individual to bear arms existed in the English Bill of Rights.⁵¹ Knowing that no right to bear arms existed at common law and that restrictions were common, the Framers of the United States Constitution constructed their own “right to bear arms” provision. The congressional debates of the First Congress, show that the purpose behind the passing of the second amendment was to prevent the federal government from destroying the local militias.⁵² As previously noted, the Supreme Court has

⁴⁷ See cases cited *infra* notes 74–80.

⁴⁸ *Scales*, 460 N.E.2d at 1130.

⁴⁹ See *State v. Nieto*, 130 N.E.2d 663, 664 (Ohio 1920). See also cases cited *infra* notes 74–80.

⁵⁰ Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53, 61 n.39 (1966) (citing 2 Edw. III, c. 3 (1328) as set out in IV CHITTY’S ENGLISH STATUTES 936 (6th ed. 1911), and in 1 STATUTES OF THE REALM 258 (1963)).

⁵¹ Udulutch, *supra* note 10, at 26. He notes that the

English Bill of Rights of 1689 was aimed at certain abuses which included the disarming of Protestants while others remained armed, its history and terms make it clear that its reference to the right of Protestants to have arms was “a class right rather than an individual right” and that “individual self defense was not within its protective purpose.”

Id. at 26 (citing *Burton v. Sills*, 248 A.2d 521 (1968) (quoting *Fetter*, *supra* note 1, at 48)).

⁵² See, e.g., *TRIBE*, *supra* note 25; EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 62–63 (1963).

interpreted the Second Amendment to guarantee only a collective right, which is not absolute and thus subject to restrictions.⁵³ However, the individual state constitutions have different language and different guarantees. The judicial interpretation of this language will determine the validity of any restrictions on the right to bear arms.⁵⁴

Because many states do not recognize an absolute right to bear arms, numerous types of restrictions have emerged. Place and manner laws limit the areas and ways in which firearms may be carried.⁵⁵ For instance, a law may prohibit carrying a concealed weapon, carrying loaded weapons, or carrying a weapon within the city limits.⁵⁶ Almost all states prohibit possession of firearms by certain classes of persons, such as felons, minors, or incompetents.⁵⁷ Other statutes or ordinances may prohibit unusually dangerous weapons.⁵⁸ Ordinances or statutes may also be expanded to permit restrictions limiting ownership to individuals with a special need for a weapon, transfer regulations, ammunition controls, licensing and registration of guns, or the implementation of waiting periods.⁵⁹ Perhaps more controversial, however, is

⁵³ See cases cited *supra* notes 20 and 32. Congress has generally used the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, to justify firearms controls. See, e.g., Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (amending 18 U.S.C. §§ 921-929 (1988)); Unlawful Possession or Receipt of Firearms, Pub. L. No. 90-351, 82 Stat. 236 (1968) (codified as 18 U.S.C. §§ 1201-1202 (1970) (repealed by Pub. L. No. 99-308, § 104(b), 100 Stat. 459 (1986)); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) ("We hold that Congress has [the] authority under the commerce clause" to prevent felons from having firearms.).

⁵⁴ See *supra* notes 29-32 and accompanying text.

⁵⁵ Ridberg, *supra* note 11, at 203.

⁵⁶ See, e.g., *Hill v. State*, 53 Ga. 473, 480 (1874) (carrying weapon in courtroom prohibited); *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (carrying pistol within city while intoxicated illegal); *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969) (carrying a loaded weapon prohibited); see also CLEV., OHIO, MUN. CODE ch. 627, §§ 627.02-04 (1990) (ordinances making it illegal to carry concealed weapon, to carry a weapon while intoxicated, and to handle firearm improperly while in motor vehicle); CIN., OHIO, MUN. CODE ch. 708, §§ 708.03-39 (placing various restrictions on transportation, possession, use and sale of firearms).

⁵⁷ See, e.g., *Nelson v. State*, 195 So. 2d 853 (Fla. 1967) (felon); *Glenn v. State*, 72 S.E. 927 (Ga. Ct. App. 1911) (minor); *State v. Bolin*, 436 P.2d 978 (Kan. 1968) (felon); *City of Akron v. Williams*, 177 N.E.2d 802 (Ohio Ct. App. 1960) (felon); *State v. Hogan*, 58 N.E. 572 (Ohio 1900) ("tramp").

⁵⁸ See, e.g., *People v. Brown*, 235 N.W. 245 (Mich. 1931) (blackjack); *State v. Kerner*, 107 S.E. 222 (N.C. 1921) (allowing statute to limit protection of possession to rifles and pistols); *Morrison v. State*, 339 S.W.2d 529 (Tex. Crim. App. 1960) (prohibiting machine gun possession).

⁵⁹ See generally Ridberg, *supra* note 11, at 206-10.

the banning of a class of weapons, such as handguns or assault weapons, from a city.⁶⁰ While many cases have arisen concerning other classes of restrictions, new questions are raised when bans on an entire class of weapons are enacted, as was done in Cleveland Ordinance No. 2661-91.⁶¹

1. *State Constitutional Limits on Restricting a Right to Bear Arms*

With the rise in the number of random violence sprees hitting many metropolitan areas, many cities have enacted ordinances banning certain weapons from their city limits.⁶² The Village of Morton Grove, a Chicago suburb, enacted the first ordinance in the United States to ban the private possession of handguns within a community.⁶³ San Francisco followed suit, as did numerous other cities around the nation.⁶⁴ The state of Virginia was the first state to pass a statute which imposed a mandatory criminal records check on purchasers of semiautomatic center-fire rifles that have a magazine capacity (as provided by the manufacturer) of more than twenty rounds, that are designed to accommodate a silencer, or that are equipped with a folding stock.⁶⁵ In 1989, responding to a random killing spree on a playground,⁶⁶

⁶⁰ See generally Ashman, *supra* note 10 (support for ban); Kates, *supra* note 1 (opposed to ban); Daniel Abrams, Comment, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488 (1992); O'Hare & Pedreira, *supra* note 1; Thomas R. Thompson, Comment, *Form or Substance? Definitional Aspects of Assault Weapon Legislation*, 17 FLA. ST. U. L. REV. 649 (1990). See also Wanda Motley, *Gun Bans Get Boost in House; the City's Ban Survives*, PHILADELPHIA INQUIRER, Dec. 16, 1993, at A1 (state house for first time moved toward imposing statewide ban on assault weapons); *Weapon Ban Sought*, WASH. POST, Sept. 17, 1989, at A20 (shooting spree in Louisville prompts move towards weapon ban).

⁶¹ Clev., Ohio, Ordinance 415-89 (Feb. 17, 1989), as cited in CLEV. OHIO, MUN. CODE ch. 628, § 628.03(a) (1990).

⁶² See *supra* note 60 and accompanying text.

⁶³ Ashman, *supra* note 10, at 97 (citing MORTON GROVE, ILL., CODE § 132.102 (1981)). The Seventh Circuit held that there was no right under the Illinois Constitution to possess a handgun; therefore, the municipality could exercise its police power to prohibit possession. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 268 (7th Cir. 1982).

⁶⁴ Ashman, *supra* note 10, at 97 n.2 (citing San Francisco, Cal., Ordinance 175-82-1 (June 28, 1982)).

⁶⁵ See VA. CODE ANN. § 18.2-308.2:2 (Michie Supp. 1994).

⁶⁶ See CAL. PENAL CODE §§ 12275-90 (West 1992); Robert Reinhold, *After Shooting, Horror but Few Answers*, N.Y. TIMES, Jan. 19, 1989, at B6. In that year alone, twenty-seven cities and counties enacted ordinances to ban assault weapons. O'Hare & Pedreira, *supra* note 1, at 196 (citing CENTER TO PREVENT HANDGUN VIOLENCE, CITY AND COUNTY ORDINANCES ENACTED IN 1989 (1990)).

California banned the future sale, production, and possession of certain assault weapons.⁶⁷ Cleveland decided to enact its assault weapon ban before it was struck with such a tragedy.⁶⁸

While these ordinances have been challenged in the courts, many have been upheld as a valid exercise of the municipality's police power.⁶⁹ These cases tend to uphold ordinances directed at protecting the safety and health of its citizens as a valid exercise of the police power. So long as the ordinance is reasonable in light of its purpose of protecting the citizens of the municipality, courts in jurisdictions applying the police power analysis will uphold the ordinance.⁷⁰

Another common justification used by the courts to uphold the constitutional validity of such statutes is that the law does not affect weapons which are traditionally used by the militia or during warfare. As such, certain weapons extend beyond the arms protection intended by the Framers of the state constitution.⁷¹ Because some state constitutions have been interpreted to

⁶⁷ Assault weapons are a type of semiautomatic weapon which require depressing of the trigger to fire a bullet, after which the cartridge automatically reloads in preparation for the next shot. Abrams, *supra* note 60, at 491.

⁶⁸ Former Clev., Ohio, Ordinance No. 415-89 (Feb. 17, 1989) stated that "[n]o person shall sell, offer or display for sale, give, lend or transfer ownership of, acquire or possess any assault weapons." Clev., Ohio, Ordinance 415-89 (Feb. 17, 1989), as cited in CLEV., OHIO, MUN. CODE ch. 628, § 628.03(a) (1990). The current ordinance has been revised (Clev., Ohio, Ordinance 2661-91 (Nov. 18, 1991) and can be located in CLEV., OHIO, MUN. CODE ch. 628, §§ 628.01-04 (1990). For more complete text of former Clev., Ohio, Ordinance 415-89 (Feb. 17, 1989), see *infra* notes 84 and 90.

⁶⁹ See Sklar v. Byrne, 727 F.2d 633, 640 (7th Cir. 1984) (holding that the right to bear arms under Illinois Constitution was expressly subject to the police power and recognizing that municipalities could prohibit all private possession of handguns); Quilici v. Morton Grove, 695 F.2d 261, 268 (7th Cir. 1982) (holding ordinance prohibiting handguns not a violation of Illinois Constitution because legislation was a valid exercise of police power), *cert. denied*, 464 U.S. 863 (1983); Collins v. State, 501 S.W.2d 876, 878 (Tex. Crim. App. 1973) (holding that a statute making it unlawful to carry a pistol "on or about person" not constitutional violation because the legislature has power to enact such a statute in order to prevent crime).

⁷⁰ In *City of Cincinnati v. Correll*, 49 N.E.2d 412, 414 (Ohio 1943), the court discussed the level of reasonableness needed to exercise the municipal police power, which essentially requires that the law "bear a real and substantial relation to the object sought to be obtained." *Id.* See *infra* text accompanying note 74.

⁷¹ See, e.g., *Fife v. State*, 31 Ark. 455, 461 (1876) (upholding the validity of a statute making it unlawful to carry an eight-inch revolver because such a revolver was not a weapon used in civilized warfare or to promote the common defense and security of state, as the constitution provided); *Beard v. State*, 122 P. 941, 941 (Okla. Crim. App. 1912) (upholding validity of a statute prohibiting the carrying of a pistol on the person).

protect only weapons traditionally used by the militia, the courts of these states have held that certain weapons are beyond the scope of the right to bear arms provision.⁷²

2. Ohio Judicial Interpretation of Restrictions on Right to Bear Arms

Ohio has long recognized a municipality's right to restrict an individual's right to bear arms through the use of the police power. Although the right to bear arms is specifically enumerated in the Ohio Constitution, a reasonableness standard still applies when exercising the police power.⁷³ As the Supreme Court of Ohio has repeatedly noted, "[t]he personal liberties granted by the Constitution, although broad and on the whole inviolate, are nevertheless subject to certain qualifications and restraints and are generally held subject to a valid exercise of the police power."⁷⁴

"[O]rdinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public."⁷⁵ Additionally, the court has held that "unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them."⁷⁶

The Ohio courts have applied this basic standard to constitutional challenges, which include the carrying of concealed arms, even in one's own home;⁷⁷ the possession of an identification card issued by a city for those acquiring handguns;⁷⁸ the prohibition against indicted persons being able to acquire firearms;⁷⁹ and a prohibition against carrying certain weapons, such as a billy club or other dangerous weapons.⁸⁰

⁷² See *supra* cases cited note 71.

⁷³ See *infra* notes 74–75.

⁷⁴ *Kraus v. City of Cleveland*, 127 N.E.2d 609, 610 (Ohio 1955).

⁷⁵ *City of Cincinnati v. Correll*, 49 N.E.2d 412, 414 (Ohio 1943).

⁷⁶ *Benjamin v. City of Columbus*, 146 N.E.2d 854, 860 (Ohio 1957).

⁷⁷ *State v. Nieto*, 130 N.E.2d 663, 664 (Ohio 1920) (noting that the constitution contains no prohibition against the legislature making such police regulations necessary for welfare of public at large).

⁷⁸ *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976) (holding that ordinance furthers purpose of safeguarding the public as much as possible from dangers of illegal weapons, and is thus a proper subject for reasonable regulation under police power).

⁷⁹ *State v. Winkelman*, 442 N.E.2d 811, 814 (Ohio Ct. App. 1981) (upholding the statute as within the bounds of the state's police power).

⁸⁰ *City of Akron v. White*, 194 N.E.2d 478, 479 (Akron Mun. Ct. 1963) (noting that protection of the general public by regulating use and transportation of dangerous weapons

Thus, because the courts have been quite liberal in construing ordinances passed under the police power as reasonable in order to reach municipalities' goals of furthering the health and safety of their citizens, it seemed very likely that the Ohio Supreme Court would extend this reasoning to yet a more expansive ordinance: One completely banning a particular weapon from a municipality due to its highly destructive capabilities, such as the ordinance in Cleveland.

III. ANALYSIS OF *ARNOLD V. CITY OF CLEVELAND*

In 1993, the Ohio Supreme Court considered for the first time the constitutional legitimacy of a complete ban on a class of weapons from a municipality in *Arnold v. City of Cleveland*.⁸¹ While the lower courts had considered the issue previously,⁸² the issue had never been decided by the state's highest court. Thus, the case has important value in the state of Ohio during a time of increasing public demand for stricter weapons regulations.⁸³

A. Case History

Arnold v. City of Cleveland arose out of a challenge to the constitutionality of a Cleveland ordinance which prohibited the possession and sale of assault weapons in the city.⁸⁴ The Court of Common Pleas of Cuyahoga County held

by the legislative authority is a legitimate exercise of the police power in the field of public safety).

⁸¹ *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993).

⁸² See *Hale v. City of Columbus*, 578 N.E.2d 881, 885 (Ohio Ct. App. 1990) (holding that city ordinance prohibiting possession and sale of assault weapons or large capacity magazines bore a substantial relation to protecting the public under municipal police power in the Ohio Constitution).

⁸³ See generally Nancy Gibbs, *Up in Arms*, TIME, Dec. 20, 1993, at 18 (public support for stricter gun control grows in response to random violence); Richard Lacayo, *Wounding the Gun Lobby*, TIME, March 29, 1993, at 29 (describing increased public opposition to National Rifle Association influence and the availability of semiautomatic firearms, and the favorable support given by the general public to recent legislative actions for gun control in New Jersey and Virginia); John Leo, *The Coming Shootout over Guns*, U.S. NEWS & WORLD REPORT, Jan. 25, 1993, at 27 (stating that handguns should be banned); Wilson Ring, *Weapons Seizure Spurs a Push for Tougher Gun Laws*, CHI. TRIB., May 6, 1991, at 1 (authorities call for passage of new package of gun control laws in hopes of combating crime after seizing illegal weapons).

⁸⁴ Former Clev., Ohio, Ordinance 415-89 (Feb. 17, 1989) (current version at 2661-91) stated the following findings:

that the ordinance was constitutional and thus granted summary judgment to the defendant City of Cleveland.⁸⁵ The Ohio Court of Appeals for Cuyahoga County affirmed that portion of the lower court's decision which stated that the ordinance was a valid exercise of the city's police power, but determined that summary judgment should not have been granted until the plaintiffs had been given proper opportunity for discovery in order to rebut the defendant's motion for summary judgment.⁸⁶ Additionally, the court held that the ordinance, by "prohibiting the transportation of certain weapons through the city by virtue of prohibiting [their] possession, conflicted with section 926(A), title 18 of the United States Code, and therefore, violated the Supremacy Clause, making the ordinance."⁸⁷ However, as the Ohio Supreme Court noted in its opinion, the City of Cleveland has since revised the ordinance so as to avoid any such conflict.⁸⁸

ch. 628, § 628.01: Findings

The Council finds and declares that the proliferation and use of assault weapons is resulting in an ever-increasing wave of violence in the City, especially because of an increase in drug trafficking and drug-related crimes, and poses a serious threat to the health, safety, welfare and security of the citizens of Cleveland. The Council finds that the primary purpose of assault weapons is anti-personnel and any civilian application or use of such weapons is merely incidental to such primary anti-personnel purpose. The Council further finds that the function of this type of weapon is such that any use as a recreational weapon is far outweighed by the threat that the weapon will cause injury and death to human beings. Therefore, it is necessary to establish regulations to restrict the possession or sale of these weapons. It is not the intent of the Council to place restrictions on the use of weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities. (Ord. No. 415-89. Passed 2-17-89, eff. 2-21-89).

ch. 628, § 628.03: Unlawful Conduct

(a) No person shall sell, offer or display for sale, give, lend or transfer ownership of, acquire or possess an assault weapon.

(b) This section shall not apply to any officer, agent, or employee of this or any other state or the United States, members of the armed forces of the United States or the organized militia of this or any other state, and law enforcement officers

CLEV., OHIO, MUN. CODE ch. 628, §§ 628.01, 628.03 (1990).

For a complete definition of "assault weapon" as defined in the CLEV. MUN. CODE, ch. 628, § 628.02 (1990), see *infra* note 90.

⁸⁵ *Arnold v. City of Cleveland*, 616 N.E.2d 163, 165 (Ohio 1993).

⁸⁶ *Arnold v. City of Cleveland*, No. 59260, 1991 WL 228628 at *3 (Ohio Ct. App. Oct. 31, 1991).

⁸⁷ *Id.* at *9.

⁸⁸ *Arnold*, 616 N.E.2d at 165 n.2. The court stated that any apparent conflict with 18

Thus, the Ohio Supreme Court had to decide the constitutionality of the enactment of the ordinance as well as the issue of summary judgment granted by the trial court and affirmed by the court of appeals.⁸⁹ The appellant's main points of appeal were: The ordinance as constructed was an overly broad restriction on the Ohio constitutional right to bear arms,⁹⁰ because it denied

U.S.C. § 926(A) (1988) (stating that a person may transport firearms from any place where they may be lawfully possessed and carry the firearms to any place where they may be lawfully possessed) and the Supremacy Clause had been corrected in the revised ordinance. In the revised ordinance, the Municipal Code states that the section does not apply to the transportation of the firearms through the City of Cleveland in accordance with federal law. CLEV., OHIO, MUN. CODE ch. 628, § 628.03(b) (1992) (referring to Cleveland, Ohio, Ordinance 2661-91 (Nov. 18, 1991)).

⁸⁹ The Ohio Supreme Court resolved the issue of summary judgment by reasoning that under its interpretation of the constitutionality of the Cleveland ordinance, there were no set of facts the appellants could have alleged that would state a claim against the appellee, City of Cleveland, and therefore, the appellants' claim would not have survived an Ohio Civil Rule 12(b)(6) motion. Because the appellee's motion originated as a 12(b)(6) motion requesting summary judgment in the alternative, the trial court would have been justified in granting that motion. Because the trial court would have dismissed the case under a 12(b)(6) motion, the Ohio Supreme Court left undisturbed its grant of summary judgement. *Arnold*, 616 N.E.2d at 165, 173 n.13.

⁹⁰ *Arnold*, 616 N.E.2d at 166. Cleveland's Municipal Code states the following definition for "assault weapon":

(a) "Assault weapon" means:

(1) any semiautomatic action, center fire rifle or carbine that accepts a detachable magazine with a capacity of more than six rounds;

(2) any semiautomatic shotgun with a magazine capacity of more than six rounds;

(3) any semiautomatic handgun that is:

A. a modification of a rifle described in division (a)(1), or a modification of an automatic firearm; or

B. originally designed to accept a detachable magazine with a capacity of more than 20 rounds.

(4) any firearm which may be restored to an operable assault weapon as defined in divisions (a)(1), (a)(2), or (a)(3).

(5) Any part, or combination of parts, designed or intended to convert a firearm into an assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3), or any combination of parts from which an assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3), [or] may be readily assembled if those parts are in the possession or under the control of the same person.

(b) Assault weapon does not include any of the following:

(1) any firearm that uses .22 caliber rimfire ammunition with a detachable magazine with a capacity of 30 rounds or less.

(2) any assault weapon which has been modified to either render it permanently

citizens of a "fundamental 'individual' right to bear arms and defend themselves,"⁹¹ and the ordinance violated the Supremacy Clause of the Federal Constitution.⁹² In reviewing all of the appellant's claims, the Ohio Supreme Court, majority was quite thorough in analyzing the reasoning behind its decision. Although the opinion is quite thorough, some areas in the untouched realm of municipal weapon bans still need to be clarified.

B. Case Analysis

The appellant first challenged the construction of the ordinance as overly broad and restrictive of his Ohio constitutional right to bear arms.⁹³ The appellant attempted to justify this claim by stating that the right to bear arms in Ohio is a fundamental "individual" right to bear arms and defend oneself.⁹⁴ This brought into question the scope of article I, section 4 of the Ohio Constitution, which had never before been questioned. In beginning its analysis, the court presented a thorough history of the debate over the existence or nonexistence of an individual right to bear arms.⁹⁵

1. *Nonexistence of a Fundamental Right to Bear Arms Under the Ohio Constitution*

The Ohio Supreme Court began by reviewing the primary United States Constitution Second Amendment decisions in order to determine the existence

inoperable or to permanently make it a device no longer defined as an assault weapon.

CLEV., OHIO, MUN. CODE ch. 628, § 628.02 (1990). Sections(c)-(j) provide various definitions of terms used throughout chapter. *Id.*

⁹¹ *Arnold*, 616 N.E.2d at 166.

⁹² *Id.* at 166. The Supremacy Clause states that "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art VI, cl. 2.

This portion of the opinion will not be analyzed, for the primary point at issue in this Note is the use of the state constitution and municipal police powers to justify gun control measures. The appellants contended that the ordinance violated various federal civilian marksmanship programs under the United States Code designed to promote rifle practice and civilian marksmanship. *Arnold*, 616 N.E.2d at 173. The court held that such programs were not impeded, "since the people of Cleveland could practice marksmanship without those firearms that have been classified as 'assault weapons.'" *Id.* at 175.

⁹³ *Id.* at 166.

⁹⁴ *Id.*

⁹⁵ *Id.* at 166-68.

of a fundamental right to bear arms. Such a right clearly has never been stated to exist under the Second Amendment as applied to the states.⁹⁶ In *Presser v. Illinois*,⁹⁷ the United States Supreme Court stated:

The Second Amendment declares that [the right to bear arms] shall not be infringed, but this, as has been seen, means no more than it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to what is called in *The City of New York v. Miln*, . . . the "powers which relate to merely municipal legislation, or what was perhaps more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.⁹⁸

The Ohio Supreme Court concluded that the majority of the United States Supreme Court decisions on the Second Amendment supported the position that the Amendment was drafted "not with the primary purpose of guaranteeing the rights of individuals to keep and bear arms, but, rather, to allow Americans to possess arms to ensure the preservation of a militia."⁹⁹ As previously stated, this collective view is the interpretation of the Federal Constitution is recognized by most legal scholars today.¹⁰⁰

While the Supreme Court cases indicate that the Second Amendment is not applicable to the states, an understanding of the Second Amendment case analysis is important, for the Ohio Supreme Court has held that the Second Amendment shall serve as a guide for the Ohio right to bear arms provision.¹⁰¹ The Ohio Supreme Court in *Arnold*, however, did not mention this vital fact. The court completed a thorough analysis of the Supreme Court's Second Amendment decisions, which essentially say that the Second Amendment applies to federal government actions only,¹⁰² but then failed to explain why the Second Amendment interpretations have particular significance in the state of Ohio.

⁹⁶ The Ohio Supreme Court cites to *United States v. Miller*, 307 U.S. 174 (1939), *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1876). See *supra* notes 20 and 32 and accompanying text.

⁹⁷ 116 U.S. 252 (1886).

⁹⁸ *Arnold*, 616 N.E.2d at 167 (quoting *Presser*, 116 U.S. at 264-65) (citation omitted) (emphasis omitted).

⁹⁹ The Ohio Supreme Court is thus recognizing only a collective right to bear arms. *Arnold*, 616 N.E.2d at 168. See discussion *supra* part II.A.1.

¹⁰⁰ See *supra* note 19 and accompanying text.

¹⁰¹ See *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920); see also *supra* note 44 and accompanying text.

¹⁰² *Arnold*, 616 N.E.2d at 166-68.

Although the court did not state the significance of the United States Supreme Court decisions and the Second Amendment, the court's remaining analysis of the right to bear arms as a fundamental right is quite clear. The court interprets the "right to bear arms" provision as providing a "fundamental individual right to bear arms for 'their defense and security . . .'" and allowing a person to possess certain firearms for defense of self and property.¹⁰³ The court continued its analysis by claiming that a fundamental right to self defense has always existed and that such rights should be protected.¹⁰⁴ While the court concedes that such fundamental rights are not absolute,¹⁰⁵ its analysis seems to ignore prior precedent.¹⁰⁶ As the United States Supreme Court has noted, not all rights guaranteed in a bill of rights are "fundamental."¹⁰⁷ Specifically in Ohio, the Ohio Supreme Court had impliedly rejected any claim that the right to bear arms is a fundamental right.¹⁰⁸ Given

¹⁰³ *Id.* at 169 (quoting OHIO CONST. art. I, § 4). *But see supra* notes 42 and 43 and accompanying text for the proposition that the clause, combined with mention of the militia, really guarantees only a collective right to bear arms.

¹⁰⁴ *Arnold*, 616 N.E.2d at 169.

¹⁰⁵ *Id.* The court cited to several sources in its fundamental rights discussion: 1 WILLIAM BLACKSTONE, COMMENTARIES *144; W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 20-21, at 129-31 (5th ed. 1984). The court does recognize, however, that even fundamental rights are not absolute: "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulation and prohibitions imposed in the interest of the community." *Arnold*, 616 N.E.2d at 170 (citing *Kraus v. Cleveland*, 127 N.E.2d 609, 610 (Ohio 1955)).

¹⁰⁶ *See supra* notes 43-47 and accompanying text.

¹⁰⁷ Brief of Amicus Curiae for Appellee, Center to Prevent Handgun Violence at 34, *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (No. 92-105) (on file with the Supreme Court of Ohio). Fundamental rights are those rights "implicit in the concept of ordered liberty." *Id.* at 33 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹⁰⁸ *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976). The court stated:

It is true that in certain areas of federal and state Constitutional law the rights of the individual are supreme. In order to so find, the language authorizing such intention must be clear and unambiguous. We do not so find here. Neither federal nor state law states that the right of an individual to bear arms is supreme over the authority of a governmental unit under the police power to regulate the purchase of arms in a reasonable manner.

Id.

This suggests that the Supreme Court of Ohio does not truly consider the right to bear arms to be a "fundamental right." Additionally, unlike some states, Ohio's Constitution does not guarantee an individual right to bear arms for defense. *See supra* notes 29, 33-49 and accompanying text.

the fact that prior interpretation¹⁰⁹ and common methods of interpreting state constitutions¹¹⁰ indicate that the Ohio Constitution guarantees a collective right to bear arms, the Ohio "right to bear arms" provision does not seem to be "fundamental" or to provide for such an individual right. Therefore, while the Supreme Court of Ohio may have reached a correct conclusion ultimately,¹¹¹ one could argue that the court erred in interpreting the Ohio Constitution's right to bear arms provision as guaranteeing an individual the fundamental right to bear arms.

2. *Use of Municipal Police Power to Justify Assault Weapons Ban*

The Ohio Supreme Court ultimately justified the assault weapons ban by recognizing the availability of the municipal police power to the City of Cleveland through the Ohio Constitution.¹¹² Because of the findings made by the Cleveland City Council regarding the dangers of assault weapons,¹¹³ and because the exercise of its police power was reasonable, the Ohio Supreme Court held that the ordinance was valid.¹¹⁴

The Ohio Supreme Court's analysis is ultimately correct in light of Ohio precedent, which conforms to the trend in many other jurisdictions.¹¹⁵ The use

¹⁰⁹ See *supra* notes 29, 33-49 and accompanying text.

¹¹⁰ See discussion *supra* part II.A.1.

¹¹¹ See discussion *supra* part II.B.2.

¹¹² The Ohio Constitution's police power provision states: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." OHIO CONST. art. XVIII, § 3. See also *supra* notes 69-70 and accompanying text.

For a general discussion of the police power as it relates to municipal corporations, see George D. Vaubel, *Municipal Corporations and the Police Power in Ohio*, 29 OHIO ST. L.J. 29 (1968).

¹¹³ Former Clev., Ohio, Ordinance 415-89 (Feb. 17, 1989) (current version at 2661-91). For full text of findings, see *supra* note 84.

¹¹⁴ *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993).

¹¹⁵ See cases cited *supra* notes 74-80 (Ohio cases using reasonable police power to justify weapon restrictions or bans). For examples of other jurisdictions allowing reasonable regulations on right to bear arms, see also cases cited *supra* note 69; *Quilici v. Village of Morton Grove*, 695 F.2d 261, 267 (7th Cir. 1982) (noting that although Framers envisioned right to have handguns, they also recognized the fact that a local government might exercise the police power to restrict or prohibit this right); *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989) (holding that prohibition on short-barreled shotguns was not unconstitutional because law bore reasonable relation to preservation of public peace and safety).

of the police power requires only a reasonableness test, which only requires that the ordinance "bear[] a real and substantial relation to the public health, safety, morals, or general welfare of the public and [that it not be] unreasonable or arbitrary"¹¹⁶ Ohio courts must balance between the potential public benefits of the ordinance and the interests of those whose individual rights are affected.¹¹⁷ In determining the best measures needed for a community, Ohio courts have traditionally given deference to the local legislature, which best knows the community's needs, for it is not the job of the judiciary to act as a legislature to determine what is best for a city.¹¹⁸ Thus, determinations by a legislative body cannot be disturbed unless they are found to be clearly erroneous.¹¹⁹ As a result, the Ohio courts have consistently applied the basic reasonableness test to gun control ordinances enacted under a municipality's police power.¹²⁰

As has been illustrated, the exercise of the police power requires only a standard of reasonableness.¹²¹ Prior cases decided by the Supreme Court of Ohio dealt exclusively with restrictions on the right to bear arms as opposed to a ban on a class of weapons. It seems only logical that the reasonableness standard applied to the use of the police power, which is concerned with the public health, safety, and welfare, should extend to bans on classes of weapons if the bans are shown necessary by a community city council. The court has noted previously that the police power not only includes the power to restrict or regulate, but it also "includes the power to make possession within the municipality of a certain kind of property unlawful."¹²² Ohio, as well as

¹¹⁶ *Benjamin v. City of Columbus*, 146 N.E.2d 854, 860 (Ohio 1968).

¹¹⁷ *See id.* at 862; *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976) (holding that governmental interest is stronger than individual rights in case of gun control restrictions).

¹¹⁸ *See Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905) (noting that "[i]t [was] no part of the function of a court or jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine . . .").

¹¹⁹ *Porter v. City of Oberlin*, 205 N.E.2d 363, 367 (Ohio 1965).

¹²⁰ *See cases cited supra* notes 77-82 and accompanying text; *see also Photos v. City of Toledo*, 250 N.E.2d 916, 926-27 (Lucas County C.P. 1969) (noting that no matter is of more public concern to the health, safety, and welfare of citizens than the indiscriminate use and purchase of firearms).

¹²¹ *See discussion supra* part II.B.1-2; *see also supra* note 115 and accompanying text.

¹²² Brief of Amicus Curiae for Appellee, Center to Prevent Handgun Violence at 9, *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (No. 92-105) (on file with the Supreme Court of Ohio) (citing *Benjamin v. City of Columbus*, 146 N.E.2d 854, 856 (Ohio 1957)). *See also Hale v. City of Columbus*, 578 N.E.2d 881, 884-85 (Ohio Ct. App. 1990) (holding ordinance banning all assault weapons constitutional under exercise of police

numerous other jurisdictions, has recognized this basic principle in enacting gun control legislation.¹²³ Thus, whether or not an ordinance is passed under the police power as a regulation or as a blanket prohibition is irrelevant. The ordinance must simply be reasonable in light of the needs of the city.

In *Arnold*, the Ohio Supreme Court held that the ordinance was reasonable, although admittedly broad.¹²⁴ While the ordinance may ban several assault weapons, it is justified and rational when one examines the public safety relationship.¹²⁵ The United States Bureau of Alcohol, Tobacco and Firearms has noted that the "modern military assault rifle contains a variety of physical features and characteristics designed for military applications which distinguishes it from traditional sporting rifles . . ."¹²⁶ including the ability to accept large detachable magazines, which provides a large ammunition supply with an ability to reload quickly.¹²⁷ The ordinance will additionally have the effect of banning the ten guns which are most often traced to criminal activity.¹²⁸ Given the fact that several dangerous guns with no redeeming sporting value are banned, and the fact that a true danger to the public safety seems inherent with such weapons,¹²⁹ the ordinance was constitutional as

power).

¹²³ For ordinances which prohibited a class of weapons in jurisdictions outside Ohio, see *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976) (prohibiting sawed-off shotguns); *People v. Smelter*, 437 N.W.2d 341, 342 (Mich. Ct. App. 1989) (prohibiting stun guns); *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989) (prohibiting short-barreled shotguns).

¹²⁴ *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993).

¹²⁵ *Id.* at 172.

¹²⁶ Brief of Amicus Curiae for Appellee, Center to Prevent Handgun Violence at 18, *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (No. 92-105) (on file with the Supreme Court of Ohio) (citing U.S. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, REPORT AND RECOMMENDATION OF THE ATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES (July 1989)).

¹²⁷ Brief of Amicus Curiae for Appellee, Center to Prevent Handgun Violence at 18-19, *Arnold* (No. 92-105).

¹²⁸ Brief of Amicus Curiae for Appellee, Center to Prevent Handgun Violence at 26, *Arnold* (No. 92-105) (citing COX NEWSPAPERS STUDY, FIREPOWER: ASSAULT WEAPONS IN AMERICA (1989)). These include the TEC-9, which is made with a 36-round magazine and ready to accept a silencer, the SPAS 12 shotgun, which is made with a 9-round ammunition capacity, and the Striker-12 shotgun, which was initially designed for riot control. Brief of Amicus Curiae for Appellee, Center to Prevent Handgun Violence at 21, *Arnold* (No. 92-105) (citing D. LONG, ASSAULT PISTOLS, RIFLES AND SUBMACHINE GUNS 42 (1986); J. LEWIS, THE GUN DIGEST BOOK OF ASSAULT WEAPONS 49 (2d ed. 1989)).

¹²⁹ For a discussion of the violence and danger of such weapon in the cities of the United States today, see sources cited *supra* note 83. See also Council on Scientific Affairs, *Assault Weapons as a Public Health Hazard in the United States*, JAMA, June 10, 1992, at

enacted under the police power of the municipality. Thus, the Ohio Supreme Court reached a correct conclusion.

3. *Summary Judgment Action*

The dissenting opinion in *Arnold* disagreed with the majority's assertion that a reasonableness standard should apply in lieu of strict scrutiny,¹³⁰ which the dissent claims should be asserted when dealing with fundamental rights.¹³¹ Additionally, the dissent disagreed with the fact that summary judgment was granted for the City of Cleveland in the first instance.¹³²

The standard for a motion for summary judgment is well established: In order to prevail on an Ohio Civil Rule 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff could prove no set of facts entitling him to recover."¹³³ Although it appears that the appellant *Arnold* was not given an opportunity to present evidence supporting or opposing the motion, the court held that "the failure to provide such notice and the granting of summary judgment were not prejudicial . . ."¹³⁴ This seems to be true in light of the dangers cited by the Cleveland City Council as the justifications for the ordinance. Such dangers would have been difficult to dispute, especially when a city has such broad discretion in justifying the use of its police power to overcome such dangers.

3067, 3067-69 for a discussion of the public health hazard due to incidents of injury and death created by such weapons and the economic burdens on society as a result; C. Everett Koop & George D. Lundberg, *Violence in America: A Public Health Emergency*, JAMA, June 10, 1992, at 3075, 3075-76 for a list of alarming statistics regarding shooting fatalities and a proposal to reverse increased casualties by initiating intervention activity similar to that taken with automobiles in the 1970s by defining motor vehicle fatalities as a public health issue; William C. Shoemaker et al., *Urban Violence in Los Angeles in the Aftermath of the Riots*, JAMA, Dec. 15, 1993, at 2833, 2836, noting that the estimated cost of gunshot trauma is 14.4 billion dollars per year (of which 86% is paid by taxpayers), and the estimated cost from gunshot wounds is between \$15,000 and \$20,000 per person.

¹³⁰ "Under the strict scrutiny analysis, a law which impinges upon a fundamental right is presumptively unconstitutional unless a compelling governmental interest justifies it." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., dissenting) (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

¹³¹ *Arnold*, 616 N.E.2d at 176 (Hoffman, J., dissenting).

¹³² *Id.* at 177.

¹³³ *Id.* (citing *Petrey v. Simon*, 447 N.E.2d 1285, 1287 (Ohio 1983)).

¹³⁴ *Arnold*, 616 N.E.2d at 173 n.13.

IV. THE FUTURE FOR ASSAULT WEAPON ORDINANCES IN OHIO

The enactment of weapons bans and restrictions has raised controversy on the national, state, and local levels, including Ohio. However, the support for stronger weapons controls has become apparent.¹³⁵ Perhaps the general public has had enough. In the course of one week an unemployed handyman stepped onto a Long Island railroad train and began to randomly shoot suburban commuters; a Chicago teenage girl fired at another teenager in a lunchtime crowd; an Atlanta police officer's son was shot to death in his driveway; and a teacher was shot while grading papers in his classroom.¹³⁶ The public has begun simultaneously to demand stricter controls while also flocking to buy their own guns for protection.¹³⁷ The courts, also, seem to be favoring restrictions on guns by municipalities through the use of the police power.¹³⁸ And now, after years of debate, national legislation in the weapons control arena has finally been enacted.¹³⁹ All of these factors will have a substantial impact on the future of gun control in general, and assault weapon ordinances specifically.

¹³⁵ See Ted Gest, *A New Attack on Crime*, U.S. NEWS & WORLD REPORT, Oct. 18, 1993, at 49; Gibbs, *supra* note 83, at 18, 20-21 (noting the paradox between the increased support in gun control measures and the increased desire to purchase guns for protection in aftermath of New York train shooting); Lacayo, *supra* note 83. A TIME/CNN poll found that 70% of Americans favor gun control and 78% favor mandatory registration of guns, but 74% oppose a ban on handguns, which is an increase of 10% from two months before. Gibbs *supra* note 83, at 24 (telephone poll of 500 adult Americans for TIME/CNN on Dec. 2, 1993).

¹³⁶ Ted Gest, *Violence and Its Terrifying Randomness*, U.S. NEWS & WORLD REPORT, Dec. 20, 1993, at 6.

¹³⁷ Gibbs, *supra* note 83, at 20-21.

¹³⁸ See *supra* parts II.B.1-2 and III.B.2; see also Carl W. Thurman, III, *State v. Fennell: The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms*, 68 N.C. L. REV. 1078, 1087 (1990) (noting that the North Carolina courts would most likely follow Ohio's lead of allowing a waiting period imposed by the police power of a legislative body).

¹³⁹ See *Criminal Behavior*, ECONOMIST, Nov. 27, 1993, at A27 (U.S. Senate finally passes gun control provisions, including the Brady Bill after seven years); Robert Lacayo, *supra* note 83, at 41 (comprehensive crime bill finally passed with three landmark provisions: a five-day waiting period, a ban of certain semiautomatic assault weapons, and a provision making possession by or sale to minors of handguns punishable by ten years in prison). For a discussion of the public health hazard created by such weapons and the economic burdens on society as a result, see Council on Scientific Affairs, *supra* note 130 at 3067-69. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110101, 108 Stat. 1796, 1996 (1994) (restricting the manufacture, transfer, or possession of semiautomatic assault weapons).

A. *Use of Assault Weapons Bans in the Future*

With the drastic increase in and awareness of crime, it seems that more and more cities are enacting restrictive gun control ordinances, including assault weapon bans.¹⁴⁰ When the state's highest court endorses such action, the cities and counties of the state will only be encouraged to enact more legislation if a city council decides that such is the answer to crime. In Ohio, *Arnold* has essentially paved the way for all other cities in Ohio to enact such legislation. So long as the ordinance is a reasonable exercise of the municipality's police power, the ordinance is constitutional and not in violation of article I, section 4 of the Ohio Constitution, the Ohio "right to bear arms" provision.¹⁴¹

As a result, a municipality can enact an assault weapons ban simply by looking to the dangers of such weapons, which are a hazard to public welfare and safety. This broad interpretation of the police power will enable municipalities in Ohio (and many other jurisdictions with similar interpretations) to enact broad weapon restrictions and bans.

B. *Impact of Federal Weapons Control Legislation*

For years, gun control advocates have tried to push the Brady Bill¹⁴² through Congress, which would have the effect of placing restrictions on handguns.¹⁴³ In 1989, Senator Metzenbaum introduced the Assault Weapon Control Act of 1989 with little response.¹⁴⁴ Now, seven years after the proposal of the Brady Bill and four years after Metzenbaum's proposal, Congress has finally succeeded in enacting legislation in light of the random crime sprees about the United States and increased public pressures.¹⁴⁵

The Brady Bill, which has finally become the "Brady Law,"¹⁴⁶ mandates a

¹⁴⁰ See *supra* notes 62-68 and accompanying text.

¹⁴¹ *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993). See *supra* part III.B.2.

¹⁴² H.R. 1025, 103rd Cong., 1st Sess. (1993).

¹⁴³ See *Criminal Behavior*, *supra* note 139, at A27.

¹⁴⁴ S. 386, 101st Cong., 1st Sess. (1989).

¹⁴⁵ See Janet Quist, *Senate Plugs Away at Crime Bill, Passes Ban on Some Weapons*, NATION'S CITIES WEEKLY, Nov. 22, 1993, at 8 (proposed crime bill bans assault weapons such as TEC-9 revolving cylinder guns, such as Striker-12, but excludes many other assault weapons); see also Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, § 102, 107 Stat. 1536 (1993) (codified in 18 U.S.C. § 922 (Supp. V 1993)), Public Safety and Recreational Firearm Use Protection Act, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1996 (1994).

¹⁴⁶ 18 U.S.C. § 922 (Supp. V 1993).

five day waiting period for the purchase of handguns, until the installation of an instant national criminal background check system, which gun dealers will have to contact before selling or transferring any firearm.¹⁴⁷ Several bills have been

¹⁴⁷ The relevant provisions of the Brady Handgun Violence Prevention Act are as follows:

[§ 102, 107 Stat. at 1536 states:]

(a) INTERIM PROVISION—

(1) IN GENERAL—Section 922 of title 18, United States Code is amended by adding at the end of the following:

“(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun to an individual who is not licensed under section 923 unless—

“(A) after the most recent proposal of such transfer by the transferee;

“(i) the transferor has—

“(I) received . . . a statement . . . containing information described in paragraph (3) [relating to identification and past criminal record];

. . . .

“(IV) within 1 day . . . transmitted a copy of the statement to the chief law enforcement officer . . . ; and

“(ii)(I) 5 business days . . . have elapsed . . . during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law . . . ;

. . . .

(2) A chief law enforcement officer to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever state and local record keeping system designated by the Attorney General.

. . . .

[§ 102, 107 Stat. at 1539 states:]

(b) PERMANENT PROVISION—Section 922 of title 18, United States Code, as amended by subsection (a)(1), is amended by adding at the end the following:

“(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter unless—

“(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system . . . ;

. . . .

pending and continue to be proposed in Congress. These include semiautomatic weapon bans (which was recently enacted into law),¹⁴⁸ increased taxes on assault weapon purchases,¹⁴⁹ and the strengthening of federal licensing standards for gun dealers.¹⁵⁰ Although most of these bills have been sent to committee and then die,¹⁵¹ However, recent Congressional initiatives have been successful, as the passage of the violent Crime Control and Law Enforcement Act of 1994, which include several assault weapon provision, illustrates.¹⁵²

Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536-1539 (1993).

¹⁴⁸ See, e.g., S. 653, 103rd Cong., 1st Sess. (1993) (proposal to prohibit the transfer or possession of semiautomatic weapons) (referred to Senate Judiciary Committee; hearings were held Aug. 3, 1993); S. 639, 103rd Cong., 1st Sess. (1993) (proposal to make unlawful the possession of certain assault weapons) (referred to Senate Judiciary Committee; hearings were held Aug. 3, 1993); H.R. 3184, 103rd Cong., 2d Sess. (1993) (proposal to prohibit the transfer or possession of semiautomatic assault weapons) (referred to Judiciary Committee); H.R. 3527, 103rd Cong., 2d Sess. (1993) (proposal to make unlawful the transfer or possession of assault weapons) (referred to Judiciary Committee). See *infra* note 152 for relevant text from Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1996 (1994).

¹⁴⁹ See, e.g., S. 868, 103rd Cong., 1st Sess. (1993) (proposal to amend the Internal Revenue Code of 1986 to increase the tax on handguns and assault weapons, to increase license application fee for gun dealers, and to use the proceeds from those increases to pay for medical care for gunshot victims) (referred to Finance Committee); H.R. 2276, 103rd Cong., 1st Sess. (1993) (proposal to amend the Internal Revenue Code to increase taxes on handguns and assault weapons, to increase the application fee for gun dealers, and to use the proceeds to pay for medical care for gunshot victims) (referred to Ways and Means Committee, Judiciary Committee).

¹⁵⁰ See, e.g., S. 496, 103rd Cong., 1st Sess. (1993) (proposal to strengthen federal standards for licensing firearms dealers and heighten reporting requirements) (referred to Senate Judiciary Committee; hearings held Mar. 26, 1993).

¹⁵¹ See *supra* notes 148-150. All of these bills have been sent to committee with no resolution.

¹⁵² The relevant provisions of the Violent Crime Control and Law Enforcement Act of 1994 regarding assault weapons are as follows:

(a) RESTRICTION.—Section 922 of title 18, United States Code, is amended by adding at the end the following new subsection:

“(v) (1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

“(2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.

“(3) Paragraph (1) shall not apply to—

While the need for national gun control is necessary in order to create uniformity across the states, a question arises as to the effect on municipalities who already have their own ordinances in effect or wish to enact further controls. The current crime packages are quite weak and do not include very comprehensive measures to truly combat crime.¹⁵³ The measures that have passed, however, will be applicable to the states through the Commerce Clause of the Constitution.¹⁵⁴ Of course, federal legislation only sets a minimum standard for gun control—a municipality can certainly enact more stringent regulations so long as it is consistent with the policy behind federal

"(A) any of the firearms, or replicas or duplicates of the firearms, specified in Appendix A to this section, as such firearms were manufactured on October 1, 1993;

"(B) any firearm that—

"(i) is manually operated by bolt, pump, lever, or slide action;

"(ii) has been rendered permanently inoperable; or

"(iii) is an antique firearm;

"(C) any semiautomatic rifle that cannot accept a detachable magazine that holds more than 5 rounds of ammunition; or

"(D) any semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable magazine.

....

"(4) Paragraph (1) shall not apply to—

"(A) the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

"(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

"(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving a firearm, of a semiautomatic assault weapon transferred to the individual by the agency upon such retirement; or

"(D) the manufacture, transfer, or possession of a semiautomatic assault weapon by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary."

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1996 (1994).

¹⁵³ See Lacayo, *Three Shots at Crime*, *supra* note 83, at 47. "Around [the crime bill's] core of solid proposals . . . are the kind of specious gestures that are made whenever Washington tries to tap into voter sentiment on what is largely a state-and-local issue." *Id.*

¹⁵⁴ For examples of other firearms regulations binding upon the states via the Commerce Clause, see *supra* note 53.

legislation.¹⁵⁵

When Congress legislates in an area which has been traditionally occupied by the states, the assumption is made that the "historic police powers of the States [are] not superseded by the Federal Act unless that was the clear and manifest purpose of Congress."¹⁵⁶ There are several situations in which a purpose to supersede state and local laws may be evidenced:

The scheme of the federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligation imposed by it may reveal the same purpose. . . . *Or the state policy may produce a result inconsistent with the objective of the federal statute.*¹⁵⁷

If more federal gun control statutes were to pass, the largest dilemma will occur with state or local policies that are inconsistent with the goals of the federal legislation. If legislation is inconsistent with the federal policies, then it is possible that such gun control legislation would preempt the local or state laws. However, laws or ordinances that create stronger controls on guns seem to be consistent with the policy behind federal gun control legislation of reducing crime and death in our society, as well as the presumption of the validity of the state use of its police power.¹⁵⁸

V. CONCLUSION

It is apparent that support for stricter controls on guns in general, and on assault weapons specifically, seems to be increasing amongst both the cities of the United States and the federal government. In fact, the 1990s seem to be "a historic period on gun control that we have not seen since the 1960s."¹⁵⁹ Increasingly, cities are adopting expansive crime control bills and weapons restrictions. Until the crime wave begins to abate somewhat, it does not seem that the weapons restriction trend will slow. Indeed, stricter federal legislation will help speed the process by making stricter controls on a uniform national

¹⁵⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 232 (1947).

¹⁵⁶ *Id.* at 230.

¹⁵⁷ *Id.* (citations omitted) (emphasis added).

¹⁵⁸ See *supra* note 151 and accompanying text.

¹⁵⁹ Ted Gest, *Little Think Tank; Big Impact*, U.S. NEWS & WORLD REPORT, Dec. 6, 1993, at 26 (quoting Josh Sugarmann, founder of the Violence Policy Center in Washington D.C.).

level, as opposed to the sporadic and often inconsistent measures taken within the cities of the United States. But it seems clear, whether on the national or local level, that the time has arrived for legislation which will limit the availability of harmful weapons.